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EXCEPTED SERVICE APPEAL RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

H. R. 3086

A BILL TO AMEND TITLE 5, UNITED STATES CODE, TO GRANT APPEAL RIGHTS TO MEMBERS OF THE EXCEPTED SERVICE AFFECTED BY ADVERSE PERSONNEL ACTIONS, AND FOR OTHER PURPOSES

SEPTEMBER 12, 1989

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EXCEPTED SERVICE APPEAL RIGHTS

TUESDAY, SEPTEMBER 12, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL SERVICE,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 311, Cannon House Office Building, Hon. Gerry Sikorski (chairman of the subcommittee) presiding.

Mr. SIKORSKI. The subcommittee will come to order.

This subcommittee of the House Committee on Post Office and Civil Service is charged with oversight and legislative matters affecting civil service employees generally. Pursuant to this responsibility and under rule 10 of the House, today we will examine H.R. 3086, the Excepted Service Appeal Rights Act of 1989. I want to thank the members of the subcommittee who, on a bipartisan basis, have cosponsored this important piece of legislation.

This legislation is not a new measure. Similar bills were introduced and were passed during the 99th and 100th Congress, as H.R. 917 and H.R. 3875, respectively. The legislation simply provides excepted service employees the right to appeal adverse actions and appraisals made by their supervisors. Currently, all members of the competitive service and preference eligible employees have these appeal rights.

Most Federal employees—secretaries, policy analysts, equal employment opportunity officers, researchers, and the wide gamut of general schedule employees—are in the competitive service and are hired only after examination and ranking by the Office of Personnel Management. Now the other groups of employees—including attorneys, and teachers, and scientists, and chaplains—are excepted from the competitive service either because there is no practical way to test these positions or because certain occupations already require certification of a minimum proficiency as a prerequisite to licensing. I see no reason that they then should have their due process rights denied them.

In most ways and at most levels, members of the excepted service are on par with other Federal employees. Their pay and benefits are the same as people of equal grade in the competitive service. They are covered by the Civil Service Reform Act. They are allowed to join unions, and for levels above GS–13 they can join associations. The only major difference between these two groups is that excepted service employees do not enjoy the basic due process rights that the other civil service employees have.

What are those rights? Specifically, before a preference eligible or a competitive status employee can be removed or subjected to serious disciplinary action, an agency must provide advance notice of the adverse action, an opportunity to respond, a written decision of the agency's reasons for their action, and the right to appeal to the Merit Systems Protection Board. No big deal. The legislation before us would simply extend these basic primary rights to most excepted service employees.

Now it does not extend appeal rights to all members of the excepted service. Those who are exempt are spelled out in section 2 of the bill—the CIA, the FBI, and others. However, the bill does give basic appeal rights to many who are currently denied them, and that is why we are doing it.

Last year's Supreme Court decision in U.S. versus Fausto makes this legislation all the more urgent. In that decision, the Supreme Court cut off an alternative method of judicial review for excepted service employees, saying that Congress, in passing the Civil Service Reform Act of 1978, had intended to deprive excepted service employees, other than those who have veterans' preference—the so-called preference eligible employees—of the right to challenge adverse actions. H.R. 3086 explicitly corrects this.

Some members of the excepted service represented by a union have tried to obtain appeal rights through the collective bargaining process, another way the problem has ballooned up. However, in the Department of the Treasury versus National Treasury Employees Union case, the U.S. Court of Appeals for the District of Columbia ruled that collectively bargained appeal rights for members of the excepted service were invalid because the collective bargaining agreement contradicted the Civil Service Reform Act of 1978, specifically, section 7121. Now H.R. 3086 would expressly correct this.

This legislation is vital to the growing number of excepted service employees who serve the Government admirably. We are not talking about small numbers. These half-million—over 500,000, men and women could probably take their talents into the private sector, where they would undoubtedly earn higher salaries. Their dedication to the public should not be penalized by sealing off appeal rights granted to other civil servants.

This morning, we are pleased to again welcome the director of the Office of Personnel Management, Constance Berry Newman. Director Newman knows the system of civil service well. She has worked at the Department of Labor, the Department of Housing and Urban Development, the Consumer Product Safety Commission, and VISTA, and, again, she is a fellow graduate of the University of Minnesota Law School. We are probably going to get tired of saying that, but what the heck.

We look forward to hearing your comments on this bill, and welcome.

STATEMENT OF CONSTANCE BERRY NEWMAN, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ACCOMPANIED BY CLAUDIA COOLEY, ASSOCIATE DIRECTOR

Ms. NEWMAN. Thank you, Mr. Chairman.

This morning, I am accompanied by Ms. Claudia Cooley, Associate Director of the Office of Personnel Management.

Mr. SIKORSKI. Thank you, and welcome.

Ms. NEWMAN. I want to thank you, Mr. Chairman, for inviting me to appear this morning to discuss H.R. 3086, entitled the Civil Service Due Process Amendments. This bill would extend to nonveterans in the excepted service the right to appeal adverse actions and performance-based actions to the Merit Systems Protection Board. The bill thus would give all excepted service employees exactly the same appeal rights as competitive service employees and preference eligibles in the excepted service. Political appointees and certain special groups, such as the foreign service and intelligence agency employees, would continue to be excluded from these appeal rights.

We cannot, Mr. Chairman, support this change in the current distinction between the competitive service and the excepted service. As you know, employees in the competitive service have had to undergo careful scrutiny in the competitive hiring process to ensure that they are being hired on the basis of merit. Furthermore, employees in the competitive service have had to undergo a probationary period before obtaining appeal rights. Excepted service employees have not had to pass through the competitive screening process. Therefore, we do not think they should have the same formal appeals process under the Merit Systems Protection Board procedures.

Our belief that we should keep in mind the distinctions between the competitive service and the excepted service does not—I repeat, does not—mean, however, that we are not interested in providing appropriate protections for the excepted service. Under current law, excepted service employees can seek the assistance of the special counsel if they believe they have been the victim of a prohibited personnel practice, such as, for example, reprisal for whistleblowing. Also, if employees in the excepted service believe they have been discriminated against, they can appeal to the Equal Employment Opportunity Commission.

Under Office of Personnel Management regulations, agencies are required to have administrative grievance systems which must cover all nonbargaining unit employees of the agency, including those in the excepted service. Agencies have the option of including the termination of excepted service employees as one of the matters that might be grieved.

OPM has recently reviewed agency grievance systems and has learned that several major agencies—including the Army, Air Force, Agriculture, Education, and NASA—have indeed decided to cover excepted service terminations. Other agencies have not covered these actions under their administrative grievance system but have established similar procedures, with advance notification, an opportunity to respond, and a right to a final written decision.

While there are some differences in the methods used, it is clear that many of the agencies have seen the wisdom of affording reasonable protections that ensure fundamental fairness to their excepted service employees, while maintaining a distinction between the competitive service and the excepted service. I intend to examine these different agency approaches to see if we need to have

more Government-wide consistency in ensuring that minimum standards are met, while continuing to allow as much flexibility as we can to the agencies to accommodate their individual needs. If changes are needed, we will be able to accomplish them administratively. Since we can and will make whatever changes are needed administratively, I urge the subcommittee not to act on H.R. 3086.

I thank you, and I am pleased to answer any questions.

Mr. SIKORSKI. Thank you, Director Newman.

As an advocate for this legislation, I am a little dumbfounded by what the big deal is about this. These are kind of basic rights—written notification, reasons, a chance to appeal, and put people under the Merit Systems Protection Board process, as opposed to letting it bubble up some place else, in collective bargaining, in the courts, and in Congress. You should see what we get as the Civil Service Subcommittee in terms of letters from people who want us to get involved in the process. These are just kind of basic rights.

Ms. NEWMAN. I guess there are a number of things that I would say, Mr. Chairman, about that. We are just as concerned about due process for excepted service employees. We have not noted, given the procedures that the agencies have established for themselves, that there is a serious problem, and we are not suggesting that there should not be procedures to protect employees in all kinds of adverse actions. The only question is whether or not the final appeal to the Merit Systems Protection Board is necessary, and therein lies the difference.

Mr. SIKORSKI. I guess I am a little confused. It is my understanding that several agencies covering hundreds of thousands of people don't have procedures that deal with excepted service employees in terms of appeal rights.

Ms. NEWMAN. Mr. Chairman, all agencies are mandated by the Office of Personnel Management to have grievance procedures that cover various kinds of actions. However, some of the agencies do not cover termination, but they do cover sort of all other actions an employee might want to grieve.

Mr. SIKORSKI. But the appeal is internal and goes to the agency.

Ms. NEWMAN. That is right.

Mr. SIKORSKI. The same people that made the determination. So I don't think that that sounds to me like basic due process is afforded there.

Can I back up a little bit. There are two points in your statement I wanted to focus on. The first one is this argument that these people, excepted service employees—and we are not talking about a paltry number, we are talking about a half-million people, are we not?

Ms. NEWMAN. My understanding is, unless we are talking about temporary employees, who are excepted also, we are talking 200,000; this is outside the Postal Service. If we are talking temporary and permanent, we are talking about 400,000.

Mr. SIKORSKI. The half-million I picked up I picked up from the Supreme Court decision footnote. So we are talking about a sizable number, either a quarter of a million or a half-million people roughly.

The point you are making in your statement, the first point, is that they didn't undergo scrutiny when they were hired and therefore they don't get due process rights after they are hired and in the process.

Ms. NEWMAN. Mr. Chairman, then I left the wrong impression. They did have to undergo scrutiny. The question is whether or not they went under the competitive process and whether they, other than by examination, either written certification or by a simple exam—they have come into the process by competing against others. There is no ranking against another person in order to come into the system as an excepted services employee.

Mr. SIKORSKI. You say that, "We cannot support this change. As you know, employees in the competitive service have had to undergo careful scrutiny in the competitive hiring process to ensure that they are being hired on the basis of merit. Furthermore, employees in the competitive service have had to undergo a probationary period before obtaining appeal rights. Excepted service employees have not had to pass through the competitive screening process."

That gives me the impression, first, that they didn't have to undergo this careful scrutiny, and now you say that they do, they just don't have the competitive hiring process that competitive service employees, went through. Secondly, it gives me the impression that we are extending people these basic rights without a probationary period, and, in fact, the legislation sets up a one-year period before these basic due process rights are triggered.

Ms. NEWMAN. I think, Mr. Chairman, that the difference here is not so much that we are not concerned about due process, because we are, but we are concerned about two points here. One is that we believe that the due process can be served by the agencies which have shown on their own motion that they are setting up grievance procedures to handle this; and, secondly, we do believe that we have an obligation to continue to allow agencies to manage their business within the context of a certain framework that provides due process.

Under the excepted service, Mr. Chairman, one of the other differences that I might make in terms of their filling those positions, is that they are not filled as a result of public notice, so that the entire world doesn't have the opportunity to apply. I'm telling you something that you know, but I guess I do believe that there is a distinction, but I am not setting up that distinction as a rationale for not having any kind of due process, it is just that I believe that what we have suggested administratively——

Mr. SIKORSKI. I think you are charged with opposing this concept, and I just think the administration is grabbing at straws to oppose it if that is what they are hanging the hook on at this point.

Let's go back one by one. In fact, these excepted service people are excepted by definition because there is no way to competitively hire these people; they are chaplains and other things and know, you set up a big competitive hiring process. Secondly, they have a certification or licensing process, like a doctor or lawyer, that they go through; and, thirdly, in reality, these things are noticed and it is competitive if there are people who want these jobs, or it is not competitive because there are not enough people that want these jobs.

On the appeal rights before probation, we specifically allow a one-year probationary period before these appeal rights are triggered. Beyond that, we are not talking about huge appeal rights in one area given to competitive service people and some other kind of appeal rights. These are kind of basic things—notice, written; reasons; and a capacity to appeal.

I don't see where any distinctions, either the ones that have been noted so far or any others, between these kinds of people should therefore trigger how we deal with them after they are in service to the public working for the Federal Government. I just don't see where the quality of these basic rights should change simply because somewhere in the process early on they jumped through some different hoops than someone else, because after they are in the Federal service and after they have had their year probation they are in the same grades and ranks and treatment for bargaining purposes and everything else as the competitive service.

The logic the administration proposes for opposing due process rights further breaks down when you have got this other class of veterans, or preference eligible excepted service people. If a lawyer who is in the excepted service who has got preference gets the appeal rights and the lawyer next door or in the same office, sharing the same secretary, getting the same pay, has the same problems and the same successes working for the Federal Government as the lawyer next to him who is preferenced, that lawyer doesn't get these due process rights; the nonpreference excepted service lawyer doesn't get due process rights, but the preferenced lawyer gets them.

Ms. NEWMAN. Except, Mr. Chairman, as to that, that further reinforces the commitment of Government to provide special protections and concerns for veterans.

I think the real difference here, Mr. Chairman, is that we do believe that there are in the present system sufficient administrative due process procedures to handle the concerns of the excepted service. We do not have, ourselves, indication that this has been a serious problem, and the agencies, on their own motion, have added to our mandated requirement for the grievance procedures—certain agencies have mandated other procedures, and we might look into making that apply universally. But, beyond that, we are not convinced that we need to do more.

Mr. SIKORSKI. We do get people that complain about this who have been in court and have expended all kinds of resources, and we do have second class civil servants because of it, and we are a better nation as we grow and learn and become wiser, and for all those reasons we should now extend due process right. Not because there are a thousand people marching on the Hill or on your office but because it is fair. We do know there are problems; we have anecdotes, and the next panel will talk about a lot of them with which they are familiar.

Let me deal with this logic again one more time through your statement. On the one hand, you say that excepted service employees are qualitatively different; therefore, they should be denied some basic due process rights. On the other hand, we give them whistle-blower due process rights; we give them equal employment opportunity due process rights; and some agencies, in fact, give

them due process rights. So if they are so qualitatively different in the first place, triggering different due process rights later on, why do we have these big holes in the logic and give them these other kinds of due process rights?

Ms. NEWMAN. Mr. Chairman, first of all, I hope I haven't said that they are qualitatively different. The point I was attempting to make is that the process by which they came into the system was not competitive. There was not the wide notice, there was not the ranking of one against the other. In terms of the quality of the people, I am not making a statement of judgment. I am sure that the lawyers, and the doctors, and the others who are in the excepted service are high quality people. That is the first point I would make.

Secondly, I am not suggesting that due process should not be provided. The main issue is whether or not there ought to be appeal rights to the Merit Systems Protection Board, but there is due process short of that, and there is due process in the grievance procedure, and we at this point believe that that is sufficient.

Mr. SIKORSKI. Some would question, and I question, whether you have real due process rights when you have no appeal rights at the end of this process except to the very people that have made the adverse determination in the first place.

Secondly, you yourself are aware of the kind of crazy-quilt process that we are inviting by allowing an agency, on an agency basis, in an issue by issue—if someone has got a whistle blower case, it can fit into a whistle blower peg hole, then there is no distinction, but if for some reason they get squeezed out of that, or equal employment opportunity peg hole, then they are back without appeal rights, unless the agency has done something different from the agency next door, and we know this is developing. As I understand it, the Department of Energy has just notified people or is moving to the process of specifically withdrawing and limiting due process rights to excepted service employees.

The issue is bothersome in the sense that we are talking about a good number of people, up to a quarter of a million people, maybe more, depending on the definition.

Secondly, we understand that increasing numbers of the people hired by the Federal Government are being put into the excepted service area. In 1988, for example, of the 37,558 new full-time Federal employees hired by the United States taxpayers, 21,969, 60 some percent of the full-time Federal employees hired last year were put into excepted service.

Ms. NEWMAN. Mr. Chairman, many of those, however, would be excepted under your bill, too, the numbers that you are using.

Mr. SIKORSKI. Now you are criticizing me for not expanding due process. Okay. I give in. I'll accept those, too.

Ms. NEWMAN. No, no. I am dealing with the narrow issue of how many people are not being covered under the appeal rights to the Merit Systems Protection Board. You are talking about the increase in excepted service employment, and many are not in the group that you are attempting to cover in this bill.

Mr. SIKORSKI. I know, but we will cover more than you cover currently.

Ms. NEWMAN. Well, I think we are making a commitment to you—and I won't keep saying this over and over again, but I will one more time—that we are making a commitment to you, however, that we are in a process of reviewing the OPM regulations and the mandate to the agencies on what should be covered under the grievance procedure, and we were planning to do this, and we will do this, irrespective of what happens on the legislation, to determine whether or not some of the procedures that are now in place in some of the agencies shouldn't be put in place across the board. That is a commitment that we are going to make.

Mr. SIKORSKI. I think that is good, and I have no doubt about your capacity and sincerity, and Ms. Cooley's as well. We, as a subcommittee, have different responsibilities, and where we see gaps like this, where the laws currently in effect are being pushed and pulled and pinched and distorted, move around, to respond to some kind of basic issues, that we have a responsibility to move in and simplify it and take the problem away from a major regulatory process.

Generally, we have agency heads who complain about having to go through a regulatory process, and I am offering to your agency the chance to not have to go through that expensive process, and troublesome process, and deal with the Office of Management and Budget. We don't have to have our legislation sit over there for weeks and negotiate with those people, we can just do it legislatively, and that will be the end of it.

I am wondering how come we are hiring so many Federal employees in excepted service.

Ms. NEWMAN. Some of it, Mr. Chairman, has to do with the nature of the vacancies and the category of vacancies.

Mr. SIKORSKI. It was the end of the administration, it was 1988.

Ms. NEWMAN. But there was an increase in the number of attorney positions being filled and an increase in the number of certain categories of physicians, and these are both categories of excepted service, so we are not broadening the nature of excepted service positions, but the numbers are increasing in the excepted service because of the categories.

Mr. SIKORSKI. Would you do an analysis of that and let us know about it, just so we can understand why there are more?

Ms. NEWMAN. Yes, we will.

[The analysis follows:]

COMPETITIVE SERVICE VS. EXCEPTED SERVICE NUMBERS

We don't know the source of your new hire figures, but they look like monthly, rather than annual, totals. The proportion of excepted and competitive service in the total varies during the year because many excepted positions are seasonal. For example, in April 1989, 19,563 new employees entered the competitive service and 19,110 entered the excepted service. In May 1989, however, 23,628 employees entered the competitive service while 37,177 entered the excepted service. Much of this change no doubt reflects the beginning of the summer hiring season, when excepted employment typically increases.

It is important to remember, also, that the new hire figures include both temporary and nontemporary appointments. Aside from separate statutory merit systems, such as the Foreign Service under title 22 and the Department of Veterans Affairs' medical positions under title 38, the excepted service generally includes a higher percentage of temporary positions than does the competitive service.

Since short-term jobs usually turn over more often and produce more new hires than comparable career-type jobs, a better basis for comparison would be the number of employees actually on board. In June 1989:

-- The Department of Agriculture had 100,034 competitive and 35,094 excepted employees. Of these, 93,595 (94%) of the competitive employees and 3,240 (9%) of the excepted employees were permanent (i.e., had appointments without time limit or with a limit longer than 1 year). That is to say, of USDA's permanent employees, 97% were competitive.
-- In the Department of Defense:
  -- The Department of the Air Force had 209,921 competitive and 40,329 excepted employees, of whom 196,443 (94%) and 31,463 (78%), respectively, were permanent. That is, 86% of Air Force's permanent employees were competitive.
  -- The Department of the Army had 304,011 competitive and 62,612 excepted employees, of whom 283,042 (93%) and 37,894 (61%) were permanent. That is, 88% of Army's permanent employees were competitive.
  -- The Department of the Navy had 308,047 competitive and 21,849 excepted employees, of whom 295,347 (96%) and 18,008 (82%) were permanent. That is, 94% of Navy's permanent employees were competitive.

  (Excepted employees in all three military departments include a significant number in intelligence functions covered by the appointing system established under title 10, U.S. Code.)

-- The Department of Health and Human Services had 107,770 competitive and 13,454 excepted employees, of whom 104,847 (97%) and 3,492 (26%) were permanent. That is, 97% of HHS' permanent employees were competitive.
-- The Department of the Interior had 64,807 competitive and 14,029 excepted employees, of whom 57,330 (88%) and 3,231 (23%) were permanent. That is, 95% of Interior's permanent employees were competitive.
-- The Department of State had 5,233 competitive and 11,314 excepted employees of whom 4,622 (88%) and 6,780 (60%) were permanent. That is, 41% of the State Department's permanent employees were competitive. (The Department's excepted employees include many in the Foreign Service.)
-- The Department of the Treasury had 150,436 competitive and 9,713 excepted employees, of whom 147,338 (98%) and 7,198 (74%) were permanent. That is, 95% of Treasury's permanent employees were competitive.
-- The Department of Veterans Affairs had 152,306 competitive and 97,506 excepted employees, of whom 140,357 (92%) and 69,677 (71%) were permanent. That is, 67% of DVA's permanent employees were competitive. (The DVA's excepted employees include professional and auxillary medical personnel appointed under title 38, U.S. Code.)

Overall, in the agencies covered by the Central Personnel Data File[1], there were 1,773,531 competitive and 404,535 excepted employees in June 1989. Of these, 1,667,946 of the competitive employees (95%) and 247,021 of the excepted employees (61%) were permanent. The highest percentages of permanent[2] employees among excepted employees were found in those agencies, such as State Department and DVA, with separate excepted merit systems.

In other words, what your new hire figures show is not a movement of jobs from the competitive to the excepted service, but rather a monthly surge in hiring activity for jobs that probably were never part of the competitive career service.

1

The Central Personnel Data File, which is the source for OPM's statistics, includes: executive branch agencies (except as noted below), General Accounting Office, Government Printing Office, U.S. Tax Court, and selected commissions in the legislative branch. The CPDF excludes: U.S. Postal Service and Postal Rate Commission, Central Intelligence Agency, National Security Agency, Tennessee Valley Authority, White House Office, Office of the Vice

President, Board of Governors of the Federal Reserve System, and Defense Intelligence Agency; all other agencies of the legislative and judicial branches; and nonappropriated fund employees in Defense activities, Commissioned Corps employees, and foreign nationals employed outside the U.S. or its territories.

2 "Permanent" positions for statistical purposes include those with time limits longer than 1 year. However, many such positions are not truly career in nature. For example, of 366 current appointing authorities in Schedule A and B, 45 have definite time limits between 2 and 7 years. Most of these have limits of 2 to 4 years. (An additional 33 Schedule A and B authorities cover only temporary or seasonal positions). Some statutory exceptions also have similar service limits; for example, the 5-year limit applicable to many Foreign Service appointments in the Peace Corps. Thus, even a comparison of "permanent" jobs may not give an exact picture of the proportion of career jobs in the excepted service.

Ms. NEWMAN. There is one other reason for the increase which will get changed eventually. Because of the Luevano case, we had used the Schedule B authority, which was also excepted. Once we get the agreement from the Luevano plaintiffs to use the six exams we will no longer be using the Schedule B authority, which will change the numbers somewhat.

Mr. SIKORSKI. Okay.

I just have to return to this. We have got people who serve admirably, a big number of people who serve admirably, for the taxpayers in the Federal service, and many of them are in positions where they could clearly go outside into the private sector and make a lot more money, and they are already making sacrifices, but even if they are not in one of those categories where they could make more money outside but are in another situation, they have served their Government and the people admirably for years, and with dedication, and there is just no reason that they should be denied some basic rights. We are not talking about extensive and expensive due process, we are talking about the right to appeal, and not have their rights defined by arbitrary agency action or a regulatory process that may be changed later on when another director or someone else comes in and takes your position. That is the only point.

Congresswoman Morella is with us, and I will yield to her for an opening statement and any questions she might have of you.

Mrs. MORELLA. Thank you very much, Mr. Chairman.

I apologize for not being here when the hearing started. It seems as though whenever Ms. Newman is here I come in right after she has made her statement.

I highly regard all of your work. I had a Science, Space, and Technology Committee hearing.

I want to thank you, Mr. Chairman, for giving me the opportunity to say a few words about H.R. 3086, the Civil Service Due Process Amendments. I am certainly pleased to be a cosponsor of this bipartisan measure.

It is really not a new concept to this committee, it has been before Congress since 1986. However, this bill differs from the previous bills by extending the rights of the excepted service personnel to appeal adverse action on performance appraisals to the Merit Systems Protection Board rather than merely to the agency.

I cannot imagine that congressional intent was to exclude certain employees from appeal rights because they are in categories that can be hired without taking a competitive examination. Yet there are others in the excepted service who do have appeal rights—the same jobs, the same qualifications, but different appeal rights. I don't want to take away from those who do have these appeal rights. Certainly veterans deserve all necessary protections; I don't think anyone would dispute that. My point is that others in the same job category should have the same protection. It is not a case of hiring preference, it is a question of appeal rights. Every employee in the public or private sector should have the ability to appeal or review an adverse personnel evaluation.

It is rather ironic that lawyers, who are Schedule A employees, defend the rights of others and argue on behalf of the Federal Gov-

ernment but are not given due process rights to defend themselves in their job performance.

We have often said in our committee that the Federal Government should be the ideal employer in the country. We should be able to attract the brightest, the most creative and enthusiastic. Will we be able to attract the brightest and best attorneys to the Federal work force, as an example? Certainly we don't pay them a competitive salary. Do we really also want to restrict their appeals process?

So I want, with those opening comments, to commend you, Mr. Chairman, for your expediency in scheduling bills which are of benefit to the Federal work force.

I will hold off on any questions at this point and maybe put some questions in writing, if I could, to Ms. Newman.

Mr. SIKORSKI. Thank you. I want to commend you for your constant and consistent vigilance on behalf of Federal employees and your service on the Civil Service Subcommittee.

Mrs. MORELLA. Thank you, Mr. Chairman. You memorized that from something I gave you before, and you did an exemplary job.

Mr. SIKORSKI. It is suitable for embroidery on a whoopie cushion, I think that is about it. [Laughter.]

Mrs. MORELLA. May I also ask that Mr. Ridge's opening statement be included in the record.

Mr. SIKORSKI. Absolutely. Without objection, it is so ordered.

Mrs. MORELLA. Thank you.

[The statement of Mr. Ridge follows:]

STATEMENT OF REPRESENTATIVE THOMAS J. RIDGE

Mr. Chairman, I would like to commend you in continuing the study of this issue which affects so many of our federal employees. Although I was only recently appointed to the House Committee on Post Office and Civil Service, I followed this issue through the past two Congresses.

As we will hear this morning, the excepted service includes approximately 500,000 professionals from diverse fields of study. Their service is not distinguished by duties, quality or dedication—they are as equally committed to public service as our competitive service workforce. Excepted service employees are not political appointees. The only factor which distinguishes the excepted service from their competitive service counterparts is the lack of a competitive examination upon entry into federal employment. For this reason, excepted service personnel are not permitted access to the Merit System Protection Board in the event of adverse action. In addition, the District of Columbia Court of Appeals has held that excepted service employees are not entitled to arbitration of disputes.

Is the lack of a competitive examination reason to deny access to the MSPB? It is my hope that the testimony presented today will explore the needs of the excepted service as well as the impact of H.R. 3086 on the structure of our entire civil service. I would like to welcome OPM Director Constance Newman and commend her for her leadership on this and other issues facing the federal workforce. In addition, I welcome all of our witnesses here this morning and I look forward to receiving their testimony.

Mr. SIKORSKI. Director Newman, Ms. Cooley, any parting comments?

Ms. NEWMAN. No. We will get the data to you.

Mr. SIKORSKI. Once again, we thank you, and it's nice having you here.

Ms. NEWMAN. Thank you.

Mr. SIKORSKI. Our next panel consists of groups that represent Federal employees in specific professions. Judge William Robie is

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the president elect of the Federal Bar Association. He is also the chief immigration judge at the Department of Justice and is a past president of Career Service at the Federal Bar Association. Mr. Jack Rollins is the president of the Overseas Education Association and has held that position since 1980. Jack has been a teacher since 1961 and taught with the Department of Defense schools since 1967. Mr. Ed Passman is the counsel with the American Federation of Teachers. The AFT has three affiliates which are directly affected by this legislation, including the Mediterranean Sea, Panama Canal, and various schools with the Bureau of Indian Affairs. With Judge Robie is Cathy Ball.

Let's begin with you, Judge Robie. Your entire comments, as submitted, will be placed in the record, as you wish, and we will ask you to summarize in five minutes.

STATEMENT OF JUDGE WILLIAM ROBIE, PRESIDENT-ELECT, FEDERAL BAR ASSOCIATION, ACCOMPANIED BY CATHERINE BALL, CHAIRPERSON, CAREER SERVICE SECTION

Judge ROBIE. The Federal Bar Association is pleased to participate in this hearing on H.R. 3086.

With me today is Catherine Ball, the chairperson of our Association's Career Service Section. We are both here on behalf of the Federal Bar Association and not in our governmental capacities.

I would like to summarize our statement and read some excerpts from it, if I may.

Our Association has supported this concept with regard to appeal rights and adverse action protections for excepted service employees officially since 1985, first on H.R. 917 in the 99th Congress, then as H.R. 3875 in the 100th Congress, and now, in its present form, in the 101st Congress, with the addition of performance rights included in the bill.

The Federal Bar Association itself represents the interests of approximately 15,000 attorneys. About 5,000 of those attorneys are in the Federal Government service in all three of the branches of the Government. Their common purpose is a concern for Federal law, practice, and procedure. The overwhelming majority of our members are current or former Government attorneys.

In its capacity as the national representative of the Federal legal profession, the Federal Bar Association believes that your legislation is the answer to providing needed access to Government-wide due process rights.

Under current law, Federal attorneys, mentioned just a moment ago by Mrs. Morella, are not entitled to the statutory due process rights afforded other employees in the competitive service when they are faced with an adverse action based either on misconduct or performance.

It seems that the reasons for having the work force divided into the competitive service and the excepted service have faded with time. Basically, the main differences described earlier this morning between the two systems is that competitive service employees have to take a test to enter the Federal Government work force; excepted service employees enter by producing a credential. You can understand why Federal attorneys may react somewhat nega-

tively when told that the bar examination that they took was not the same as taking a test to enter Government service.

Like many employees in the Federal competitive service, attorneys often spend their entire careers in the Federal Government. The loss that attorneys suffer as a result of an adverse action is the same as the loss suffered by a competitive service employee. Because of this, both groups should be afforded the same procedural protections in both Chapter 75 actions as well as Chapter 43 actions. We particularly appreciate the chairman's insight and the cosponsor's in including Chapter 43 actions in this version of this important legislation.

We believe it is in the public interest to relieve employees of the risk of an arbitrary action with regard to their employment in order to assure that their clients, the clients of these lawyers who are Federal decision-makers, are able to obtain sound and objective legal advice and representation unfettered by the fear of arbitrary personnel actions.

Thank you very much. I would be happy to answer any questions that you may have.

[The statement of Judge Robie follows:]

Statement of Judge William R. Robie
President-Elect, Federal Bar Association
before the Subcommittee on Civil Service
House Post Office and Civil Service Committee
September 12, 1989

The Federal Bar Association is pleased to be provided the opportunity to appear before you to testify in favor of H.R. 3086. This proposal, to enact legislation to provide to careerists in the excepted service the same procedural due process accorded to members of the competitive service, is an initiative that the Federal Bar Association has been urging for the last five years. Hopefully, we will reach a successful conclusion in this Congress.

The Federal Bar Association represents the interests of approximately 15,000 attorneys. Their common purpose is a concern for Federal law, practice and procedure; the overwhelming majority of our members are either current or former government attorneys. In its capacity as the national representative of the Federal legal profession, the FBA believes that your legislation is the answer to providing needed access to government-wide due process rights.

Under current law, Federal attorneys are not entitled to the statutory due process rights afforded other employees in the competitive service when faced with an adverse action based on misconduct or performance. Federal attorneys are subject to adverse actions with or without cause. Competitive service employees are entitled, generally, to 30 days written notice of a proposed action; they have a period of time available to respond to the action; they have the right to representation by an attorney or other person; they receive a written decision supported by specific reasons as soon as practicable; they may appeal to the Merit Systems Protection Board. Federal attorneys have none of these rights.

The reasons for having the workforce divided into competitive service and excepted service seem to have faded with time. Basically, the main difference between the two systems is that competitive service employees have to take a test to enter the Federal government workforce. Excepted service employees enter by producing a credential. (You can see how Federal attorneys react when told that the bar exam they took was not the same as taking a test to enter government service.) From point of entry, however, all employees share the same working conditions, the same retirement and thrift savings plan, the same pay limitations, and also, the same dedication to public

service. Like many employees in the competitive service, attorneys often spend their entire careers in the Federal government. The loss that attorneys suffer as a result of an adverse action is the same as the loss sufferred by a competitive service employee. Because of this, both groups should be accorded the same procedural protections in both Chapter 75 actions and Chapter 43 actions. We appreciate your insight in including Chapter 43 actions in your version of this important legislation. There is simply no reason to expand procedural rights for only half of the actions involving discipline.

The Federal Bar Association believes it is entirely consistent with excepted entry into the career service to afford procedural due porcess to Federal attorneys. We believe strongly that government attorneys in the career service should be relieved of the risk of such arbitrary actions. It is in the public interest to relieve employees of that risk in order to assure that their clients - Federal decision-makers - are able to obtain sound and objective legal advice and representation unfettered by fear of arbitrary personnel actions.

In these times, when the government is able to provide so little in the way of incentives to attract and retain Federal attorneys, particularly at a time when pay for attorneys is lagging from 39% to 61% behind the private sector, the government should show that it is committed to improving the quality of employment for Federal workers in some way. Pressing for passage of your bill is a step in the right direction.

Mr. SIKORSKI. Thank you. You made it under the time limit, too.

Mr. Rollins, welcome, and, again, your testimony will be entered as you wish, and I don't think you have any trouble with the time limit, so I will let you go.

STATEMENT OF JACK ROLLINS, PRESIDENT, OVERSEAS EDUCATION ASSOCIATION

Mr. ROLLINS. No, sir. I made it very short, recognizing that most of the witnesses have provided adequate evidence to the need. I will be brief.

I am Jack Rollins, president of the Overseas Education Association. I represent 8,500 teachers that work for the Department of Defense Dependents Schools overseas and the Department of Defense Section 6 Schools in the United States. We are also affiliated with the National Education Association, which has approximately two million members.

The majority of the Department of Defense teachers are excepted service Federal employees who obtained career status after serving a three-year conditional period. More than 80 percent of our teachers are women. Seven years is the average number of work years for our teachers, and 42 is the average age.

Approximately 1,200 teachers are hired annually on a competitive basis and serve a one-year probationary period. For those who remain in service, they will continue in the excepted service conditional category for three years and then obtain career status.

With the recent court decisions, as mentioned in testimonies, all of our teachers are now categorized as "without due process" or "permanent probationary" employees and are being denied grievance rights for adverse actions, such as dismissals based on performance and discipline.

Since 1969, the Overseas Education Association has been negotiating contract language with the Department of Defense Dependents Schools that incorporated the rights of employees to grieve adverse actions. We were able to negotiate the provisions of contracts under past executive orders and the Civil Service Reform Act until recent Circuit Court decisions.

On September 18, 1989, a new negotiated contract will go into effect with an appeal from the Department of Defense on our grievance rights by adverse actions. Management has now taken the position on each management disciplinary action that teachers do not have the right to arbitrate adverse actions.

We have a long history of abuse by managers under the past system of probationaries, but we have been able to weather the abuse in most cases due to the one-year limitation on the probationary period. Now, with the recent court decisions, we are beginning to have the same form of abuse for career employees who are categorized as "permanent probationaries." It is our opinion that this will have an adverse effect on recruitment of new teachers from the United States who already feel abused under the one-year probationary period, regardless of the number of years of teaching and the type of credentials they bring with them. With the permanent probationary concept, we feel that teachers will be reluctant to spend time overseas without some form of due process rights.

H.R. 3086 is an attempt to clear up the problems by giving excepted service employees the same adverse actions appeal rights as competitive service employees. The National Education Association and the Overseas Education Association support your endeavors toward passage of H.R. 3086. Along with other organizations, we join with you in promoting this cause.

Thank you, sir. I am open to questions.

Mr. SIKORSKI. Thank you.

Mr. Passman.

STATEMENT OF EDWARD H. PASSMAN, COUNSEL, AMERICAN FEDERATION OF TEACHERS

Mr. PASSMAN. I am here on behalf of the American Federation of Teachers and its Federal sector affiliates, the National Council, of Bureau of Indian Affairs Educators, the Overseas Federation of Teachers, and the Panama Canal Federation of Teachers. I am also a member of the Federal Bar Association and am pleased to see that they have endorsed this bill as well.

Although AFT and its affiliates often are competitors of the National Education Association and the Overseas Education Association, we share common ground in endorsing H.R. 3086. This bill is urgently needed because, as Jack Rollins has stated, our teachers have been stripped of their grievance arbitration rights by virtue of recent court decisions.

Despite the fact that Federal sector teachers who are unionized in the Department of Defense and the Bureau of Indian Affairs have enjoyed grievance arbitration rights for more than 10 years since the passage of the Civil Service Reform Act, they have now been stripped of those rights by court decisions because those decisions hold, unless you are otherwise entitled to appeal to the Merit Systems Protection Board, you cannot be covered by arbitration for adverse actions. This is a very serious deficiency that has left Federal teachers at the mercy of management although they might be career employees for more than 20 or 30 years.

Ms. Newman's testimony to substitute administrative grievance procedures will not work because these teachers are already covered by collective bargaining agreements. Therefore, there is a serious question as whether they would even be eligible to use administrative grievance procedures. But in any event, those procedures would not include binding third party arbitration. As a result, the agencies would make the final decisions on their proposed actions, which hardly comports with procedural due process.

By passage of H.R. 3086, Federal excepted service employees will be covered now under chapters 75 and 43 and thereby will regain access to the grievance arbitration procedures which they have had for the past 10 years.

For all those reasons, the American Federation of Teachers strongly supports the passage of this bill which should be done as soon as possible to protect employees whose rights have been lost.

Thank you. Are there any questions?

[The statement of Mr. Passman follows:]

STATEMENT OF EDWARD H. PASSMAN
PASSMAN and BROIDA
SUBMITTED TO THE
SUBCOMMITTEE ON CIVIL SERVICE

Mr. Chairman and Members of the Subcommittee: On behalf of the American Federation of Teachers, AFL-CIO and its federal sector affiliates - the National Council of Bureau of Indian Affairs Educators (NCBIAE), the Overseas Federation of Teachers (OFT), and the Panama Canal Federation of Teachers (PCFT), - I would like to express our appreciation for the opportunity to testify on H.R. 3086, the Excepted Service Appeals Rights Act of 1989. NCBIAE represents approximately 1,000 excepted service teachers in the Bureau of Indian Affairs (BIA) Schools in Arizona and New Mexico, OFT represents approximately 900 excepted service teachers in the Department of Defense Dependents Schools (DoDDS), Mediterranean Region, including Spain, Italy, Greece, Turkey and Bahrain, and PCFT represents approximately 450 excepted service teachers in DoDDS Panama Region. All of the A.F.T. Federal sector affiliates have their teachers covered under collective bargaining agreements.

The A.F.T. has strongly supported prior bills to amend chapter 75, title 5 of the United States Code and even more strongly supports this bill which grants both chapter 75 and chapter 43 appeal rights. The present bill is urgently needed due to a series of court decisions which have stripped excepted service employees, with the exception of veterans preference eligibles, of their appeal rights, including judicial review, in the case of adverse actions brought for either alleged misconduct or unacceptable performance. This bill will also effectively restore grievance-arbitration rights to Federal teachers under collective bargaining

agreements which they have enjoyed since the passage of the Civil Service Reform Act of 1978, but which have been taken away by court decisions limiting grievance-arbitration rights to employees with coverage under statutory appeals procedures. Without such statutory appeals protection, Federal teachers are at the mercy of management who can, at present, terminate them with impugnity.

The A.F.T. and its Federal sector affiliates believe that the present bill strikes a reasonable balance between protecting career Federal employees who happen to be in the excepted service due to special statutory provisions, e.g., DoD and BIA teachers, and the exclusion of those excepted service employees who are engaged in special functions, are reemployed annuitants, or have other statutory protection against arbitrary and capricious adverse actions, including dismissals. Teachers who make a career in Federal service deserve to be protected to the same extent as their Federal sector colleagues in the competitive service and should be covered by statutory appeals procedures and, more importantly, grievance-arbitration procedures under their collective bargaining agreements. It is almost of unheard for a large number of Federal employees to lose coverage for the most important protection offered by union exclusive recognition - the right to negotiate for a neutral arbitrator to decide whether a termination has been taken for just and sufficient cause.

As noted by the Hon. Patricia Schroeder, former Chairwoman, Subcommittee on Civil Service, in her opening statement on H.R. 917, excepted service employees should be entitled to the same administrative due process as their counterparts in the competitive

service and excepted service employees with veterans preference - advance written notice of the specific reasons for a proposed adverse action, the right to an oral and written response, and the right to appeal the action to the Merit Systems Protection Board (MSPB). A Federal job is a property right, and excepted service employees who have completed their probationary periods have a reasonable expectation that they will not be fired at whim. Excepted service Federal employees also deserve the same statutory protection as postal supervisors, managers and postmasters which was granted by P.L. 100-90.

In conclusion, the A.F.T. would like to again emphasize the urgency of the situation which H.R. 3086 will correct. Dedicated career Federal teachers who have traditionally been protected through their collective bargaining agreements are presently without any coverage for adverse actions taken under either chapter 43 or 75. These teachers as well as other career Federal excepted service employees deserve procedural due process before being permanently removed from Federal employment and the right to appeal the action to an independent tribunal. It must be kept in mind that termination from Federal employment often amounts to economic capital punishment.

Mr. Chairman and Members of the Subcommittee, the American Federation of Teachers thanks you for your continuing support of Federal employees. A.F.T. looks forward to working with you to improve job security for all Federal excepted service employees.

Mr. SIKORSKI. Thank you all.

I am going to turn over the questioning to Congresswoman Morella.

Mrs. MORELLA. Thank you very much, Mr. Chairman, and I appreciated hearing from this panel about the need for the legislation.

I know that Mrs. Newman, who has just taken on all the problems of the world, has said that she felt it could be done administratively, and I guess your feeling is that we need to have it in law so that there is no question and that the courts don't again come out and say that it has to be congressionally mandated. Is that a point that you would like to stress?

Mr. PASSMAN. I don't believe it can be done administratively. That is the whole problem. Of course, they have said that unless teachers or other excepted service employees—attorneys—have adverse action appeal rights under statutory appeals procedures, they cannot be covered under grievance arbitration procedures for adverse actions. Therefore, it cannot be done administratively, it can only be done legislatively, due to these recent court decisions.

Mrs. MORELLA. A very good response.

Does anyone else want to comment on that?

Mr. ROLLINS. We feel there is a great need for this, especially since at the very end of the last school year we had several dismissals, and they were based on this one decision, and that is, no further do we have adverse appeal rights, so we had no way to grieve. We are going to arbitration on those cases, but it will be up to the arbitrator to decide whether we can even arbitrate, and then they will appeal the arbitrator's decision.

In our recent contract negotiations, we did negotiate grievance procedures for adverse actions, but the management took a challenge to that, and they will appeal the arbitrator's ruling that we can contract for it. So that is on hold pending the appeal.

So we find that we have no recourse but to legislate it because through the appeals process it has taken more than four or five years before we get answers.

Mrs. MORELLA. Would the judge agree?

Judge ROBIE. The administrative process will not allow for appeal rights to the Merit Systems Protection Board and cannot without some statutory basis to do that. It would continue to be an internal agency grievance procedure.

One of the things perhaps to think about here is a slightly different perspective. It seems to me that one of the difficulties that occurs not only in the due process area but in the costs involved both to the Government and to the employee occurs when we don't have the opportunity for an administrative process that goes through that that most employees have available to them.

There are then court cases that get filed at the United States District Court level that involve a significant amount of time and effort both on the part of the individual seeking to get some redress for whatever adverse action has been taken, but significant amounts of time on the part of Government managers and Government attorneys who have to defend those cases in a trial level U.S. district court forum rather than having that opportunity to have that addressed in an administrative process through the Merit Sys-

tems Protection Board that is more normal and requires considerably less expenditure than under the Federal court system.

Mrs. MORELLA. Are you saying that there's an added dimension than even the fiscal costs as well as the energy commitment of resources that is made to go the other route?

Judge ROBIE. Exactly.

Mrs. MORELLA. Mr. Rollins, picking up on something that you said, and it is also in your testimony, you said "a long history of abuse," as I recall—"We have a long history of abuse by managers under the past system of probationaries." What is that long history of abuse?

Mr. ROLLINS. Yes, Ma'am. Each year DODDS recruits approximately 600 to 700 teachers from the United States. They claim to have 6,000 applicants from which they choose these 600 to 700, and so they claim they get the cream of the crop, and, with that understanding, they get these teachers to go abroad but they automatically put them into a one-year probationary period with no due process rights.

Now in a year's time we have several dismissals from an immediate supervisor based on performance or disciplinary action.

Mrs. MORELLA. Several dismissals?

Mr. ROLLINS. Dismissals, outright dismissals.

Mrs. MORELLA. Several, though?

Mr. ROLLINS. Several. Every year, several dismissals of the 600 applicants who go abroad and work the one-year probationary, knowing they have no due process rights and are subjected to immediate dismissal with no rights.

Mrs. MORELLA. But "several" doesn't sound like a lot. You see, that is what I am talking about.

Mr. ROLLINS. Pardon?

Mrs. MORELLA. You are talking about 600 that were chosen for the probationary period, and you say several were denied on the basis of performance to be renewed. That doesn't sound like it is a lot, does it?

Mr. ROLLINS. No, Ma'am, because those 600 know that they dare not challenge anything or speak to anything and, as we say, keep your nose clean for a year so that you have due process rights before you speak out on anything in the Federal Government. So they do go abroad knowing, as from our advice, that you keep your nose clean.

Mrs. MORELLA. I would think all employees would do that.

Mr. ROLLINS. I know, I know that, but I am saying, with the promotion that they are getting the cream of the crop and then turn around and dismiss them outright on their performance with no due process, knowing they can do that. They give no excuse for dismissals.

Mrs. MORELLA. I like the idea of due process, obviously, as a cosponsor of this legislation. I guess what I am getting at is, do we really have a terrible abuse of the current policy, which I would like to see certainly changed, if you are going to have a couple of people, or several, out of 600 who lack the performance abilities? To me, that is a small number.

Mr. ROLLINS. Yes, Ma'am, but we feel that we don't have any protection for a period beyond the probationary. Then, with a permanent probationary status we will have a lot more dismissals.

Mrs. MORELLA. Would you like to comment?

Mr. PASSMAN. Yes. I think the reason that we have had less dismissals in the Department of Defense Dependents Schools in the past was because employees had the right to arbitration.

In one school in which OFT represented employees, four proposed removals were given to employees out of a staff of approximately 10 teachers. This could have been a tragic situation, but because of recourse to grievance arbitration procedures I believe one or two of them settled for lesser penalties and the others were reversed. So, as a result of the protections in the past, we were able to overcome these types of situations, but as of the present time if this re-occurred the teachers would be at the mercy of management and they could have removed all four of those teachers.

Mrs. MORELLA. When people are removed under the current system, how are they replaced? Is it easy to? You mentioned you had 6,000 for 600 spots? Does that continue?

Mr. ROLLINS. Then they recruit again. They go through the recruitment process each year.

Mrs. MORELLA. But you have got people waiting, gearing up for those jobs, so there is no difficulty getting replacements. Is that right?

Mr. ROLLINS. They claim to have 6,000 applicants. We have no proof otherwise. But they also claim that they cannot recruit enough teachers, especially TAG and special ed., and comp. ed., and so forth, so they have not been successful in recruiting the total number of authorizations they have in.

Mrs. MORELLA. But you, Mr. Rollins and Mr. Passman, you do believe in performance evaluations of educators. I am a former educator, and I believe very strongly that, by our peers or whatever the set-up is, we are all subject to that. You are not saying that you don't in any way.

Mr. SIKORSKI. Let the record show that both Mr. Rollins and Mr. Passman are nodding their heads, yes.

Mr. PASSMAN. Yes.

Mrs. MORELLA. I thank you all. You certainly have pointed out to me that the panel has the need to do this legislatively since it would not be effective administratively, and I thank you very much, and I thank you, Mr. Chairman.

Mr. SIKORSKI. Thank you.

Mr. Rollins, you mentioned that for 600 or 700 positions you get 6,000 to 7,000 people. It sounds pretty competitive to me, and I think DOD would say they get real competition for those job openings, even though they are not going through a testing process. Right?

Mr. ROLLINS. The Government also claims that for the qualifications standards for recruitment of teachers overseas their standards are higher than any other State system.

Mr. SIKORSKI. There are a couple of good reasons, in my estimation, for making this pretty obvious. One is, we believe in people having basic rights, and these are not big deal rights, these are

kind of minimal, basic, primary rights that people should have when they work for the Federal Government.

The second reason is that there are some problems. We heard earlier that nothing is broken, so let's not fix it. I am told, and I understand, and I know from our mail, that there are problems with excepted service nonpreferenced employees who have adverse actions taken against them in performance appraisals as well as in firing and demotion. Is there a problem? Should we fix it, or should we just do it out of philosophical concern, niceness for American due process?

Judge Robie.

Judge ROBIE. The problems certainly in the attorney area are sporadic, they are not constant and ongoing, but when they occur they tend to make a fairly significant splash.

I think this legislation in some respects in its very early states resulted from the Navy dismissal of an attorney on the West Coast by the name of Stokewitz. That made a significant impact, I think, because of the role that the lawyer played, and the decision-maker that he advised, and some of the issues that revolved around the advice that the attorney was giving.

There are assistant United States attorneys who are dismissed every year. There are attorneys in a number of agencies who are dismissed every year. I would not say that they were in huge numbers, that it was a significant number of people, probably no greater percentage-wise than the numbers that Mr. Rollins was talking about with regard to teachers.

Mr. SIKORSKI. They have cost the Government to defend, and having them in court instead of in the Merit Systems Protection Board process, which is what we are talking about.

Secondly, there has to be a morale problem. If you are sitting next to someone who is veterans' preference or someone who is competitive service but you are all in the same boat, and you get the short end of the stick when it comes to due process rights, we have set up a second or third-class kind of system for a not very good reason in my estimation.

Judge Robie, one last question. The Department of Justice has made some kind of argument that these appeals rights would somehow impinge upon professional responsibility or ethical responsibility of Government lawyers. I took Professional Responsibility in law school, and there is a bar exam that tests on that as well. I don't understand that argument. Do you understand it better?

Judge ROBIE. I'm sorry, I am not familiar with the argument, so I am not in a very good position to respond to it.

Mr. SIKORSKI. Okay.

Any further comments by the panel? If not, we thank you.

Our third and final panel consists of presidents of three major Federal employee unions whose members stand to be affected by this legislation and are affected by the current state of affairs. John Sturdivant is the president of the American Federation of Government Employees, the largest union representing Federal employees; Jim Peirce is the president of the National Federation of Federal Employees, representing over 150,000 Federal employees; and Bob Tobias is the president of the National Treasury Employees Union, which represents over 140,000 workers.

We thank you all for being here.

It it my understanding that John is at a meeting at the Department of Labor.

Ms. ADAMS-CHOATE. Yes, and he hopes to be here.

Mr. SIKORSKI. Okay. We will start with Mr. Peirce and go from there.

Ms. ADAMS-CHOATE. Fine.

STATEMENTS OF JAMES PEIRCE, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. PEIRCE. Thank you, Mr. Chairman. I'll try not to be redundant. Even though I had this summarized, I will probably make it even shorter than that.

On behalf of the National Federation of Federal Employees, I appreciate the opportunity to appear before you today to testify in favor of H.R. 3086, the Civil Service Due Process Amendments.

NFFE believes very strongly that employees should have the right to contest in a neutral forum any charges affecting their employment. We commend Chairman Sikorski for his effort to address the problem which has denied thousands of dedicated civil servants basic due process rights.

I am going to depart here, because I think we have talked about the court decisions. To me, the important aspect of this is that we on the union side in the past have had protection for excepted service employees through contracts, through the grievance procedure, and arbitration. The court decisions have decided that we no longer have that. This, to me, is an important thing.

I hear some talk of numbers. I have a problem. If something is right, it is right. If it is just one person, it is still right that we have due process. This is the United States of America, a country where everybody should have a right to address their complaint to somebody in a due process forum to the extent that they can get an objective decision out of it, other than a subjective decision, and I think that is the crucial aspect of what we are talking about. Without that, I think we do a big wrong to anybody in this country, and especially the excepted service. You are going to find an awful lot of dedicated people there that stay with the Government even under very adverse conditions, and the morale out there is something else, as you already brought up, that we should consider. It is not only low, it is below the carpet. When you get to the point that they have no avenue to address wrongs that have been put upon them in any forum, then that is wrong.

So to summarize, we appreciate your participation as far as this bill is concerned, we appreciate your backing it up, and we hope that for the first time in a long time we are going to be able, really, to give the excepted service employees something that they have long needed.

Thank you.

[The statement of Mr. Peirce follows:]

STATEMENT

BY

THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES

On behalf of the National Federation of Federal Employees, which represents over 150,000 Federal employees, including approximately 25,000 workers in the excepted service, I appreciate the opportunity to appear before you today to testify in favor of H.R. 3086, the Civil Service Due Process Amendments.

NFFE believes very strongly that all employees should have the right to contest, in a neutral forum, any charges affecting their employment. The employment-at-will doctrine for private sector workers has been undergoing evaluation and change by the courts throughout the United States. The trend appears to be toward an enhancement of employee rights. We commend Chairman Sikorski for his effort to address the problem which has denied thousands of dedicated civil servants basic due process rights.

The excepted service consists of those Federal employees who may be hired without taking an examination or otherwise submitting to full competitive hiring procedures. Originally this exemption from examination was given to employees in specialized fields, such as attorneys and chaplains, where outside certification made Federal examination unnecessary. However, the excepted service now includes an ever increasing number of jobs for whom Congress has determined that examination would be inappropriate -- as well as jobs where the competitive examination process is not possible, either because of suspension of examination or for other reasons.

Under current law, excepted service employees have very few job protections. They may be fired with no explantion or right to appeal. They can be removed from employment more easily in reduction-in-force (RIF) actions and their appeal rights in these circumstances are limited. In addition, job mobility for excepted service employees differs from the mobility provided to competitive employees; they cannot transfer from one agency to another without going through the same hiring process as individuals who are outside government service.

The original rationale given for this different treatment of excepted service employees was that because they did not undergo the same government testing to get into the Federal service, they did not deserve the same rights as other employees. We find this argument to be specious at best.

Recent court decisions have been troubling, as they have interpreted the denial of appeal rights for excepted service employees in the Civil Service Reform Act to preclude alternative avenues of review as well. In U.S. v. Fausto, a 1988 case, the Supreme Court held that the exclusion of

nonpreference eligible excepted service employees from the Merit Systems Protection Board appellate procedures revealed a Congressional intent to cut off other review procedures, including judicial review under the Back Pay Act.

The problem faced by excepted service employees has been compounded by a decision issued this year by the U.S. Court of Appeals for the District of Columbia Circuit. In Department of Treasury v. FLRA, the Circuit Court held that the Civil Service Reform Act, as it now stands, reveals an intent that excepted service employees should not be able to grieve or arbitrate adverse actions. As a result, the Court concluded that unions could not negotiate grievance arbitration decisions for the excepted service workers whom we represent. This decision has had a grave impact on the rights of these Federal workers across the country. The right to arbitrate over adverse employment decisions had become the forum of last resort for excepted service employees. Now, however, this important avenue has also been foreclosed to these workers.

The ranks of the excepted service include a large proportion of employees with long and dedicated Federal service. Under current job market conditions, employees compete for excepted service positions through the application process, even where examinations are not required. There is simply no justification for withholding from these people the basic due process rights that they deserve.

In many cases, excepted service workers do not realize that they are not entitled to the same protections as tenured, competitive employees until they face adverse employment action. Many such employees do not realize that they are in the excepted service. Many people may work side by side, performing the same work, but one may be in the competitive service and one may be in the excepted service. While their jobs may be similar or the same, their procedural rights should a supervisor want to discipline them, would be very different. H.R. 3086 is an excellent beginning towards recognizing the value of excepted service employees. The establishment of due process rights for these employees is a most basic right that any employee should expect.

NFFE also strongly supports H.R. 3086's inclusion of excepted service employees under Section 4303 of Title 5, concerning actions based on unacceptable performance. The existing inequity regarding removals based on unacceptable performance is a violation of the merit principle which accords fair and equitable treatment in all aspects of personnel management to Federal workers and this oversight should be changed.

As several reports have documented, the pay gap between private sector employees and Federal workers has never been wider and morale has never been lower among Federal workers. For a good many reasons, many Federal workers feel extremely vulnerable. Mr. Chairman, as you have noted, excepted service employees serve the government out of a sense of commitment. These men and women could take their talents elsewhere, but they have not. Their dedication to the Federal government should not be discouraged by sealing off appeal rights granted to other employees.

H.R. 3086 would help to improve morale by extending the protections of the Merit Systems Protection Board to a larger group of employees. NFFE also believes that the protections offered by this bill would be very beneficial to the groups of excepted service employees who would not currently be covered by this legislation, such as National Guard civilian technicians and medical professionals employed by the Department of Veterans Affairs. These employees are hired under statutory authorization which specifically excludes review of adverse actions by the Merit Systems Protection Board. NFFE strongly urges that these employees are just as deserving of basic procedural due process as are competitive service employees and other excepted service workers. We urge you to consider legislation similar to H.R. 3086 that would grant similar appeal rights to these groups of employees.

H.R. 3086 is an important first step toward uniform treatment of all Federal workers. We urge the Subcommittee to continue to consider the many other ways in which excepted service employees are treated differently from competitive service employees and to consider other measures which would narrow or eliminate the disparity between these two career paths.

That concludes my statement. I would be happy to answer any questions, Mr. Chairman.

Mr. SIKORSKI. We thank you very much.
Mr. Tobias, good morning and welcome.

STATEMENT OF ROBERT M. TOBIAS, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Thank you. Thank you very much, Mr. Chairman, for your interest in this legislation.

I believe we must start the analysis of this bill by accepting a very fundamental truth. Personnel actions must be based solely on the performance of public service, and actions taken on any other basis or the perception that personnel actions are rooted in non-work-related factors does violence to both the internal and external credibility of the Federal service and destroys any chance for an efficient and effective Government. We know there must be a check on the actions of decision-makers to ensure fairness and that decisions are consistent with the public interest.

Within the Federal personnel structure, as this bill correctly points out, there is a real hole where management is not required to act for the right reasons and where there is no effective check on the validity of management actions. In the nether world of the excepted service, employees work subject to the whim and pleasure of their managers. No length of service and no level of performance in the excepted service can protect a nonpreference eligible employee from the illegitimate or irrational actions of a manager or a supervisor. There is no meaningful remedy or recourse available to employees suffering the consequences of personnel actions rooted in politics, personality, nepotism, or just plain stupidity. Serving the public is subordinated to pleasing the boss, and all of us have paid a huge price, as we have seen in HUD and in the thrift industry, for situations where the boss was pleased at the expense of all of us.

Absent the right of appeal, management is a personnel law unto itself, and I suggest, Mr. Chairman, that even if no one is discharged the dynamics of the relationship change when an individual has no appeal rights. That change alone is enough reason to justify this bill.

The current situation is irrational, inconsistent with the legislative intent of the Civil Service Reform Act, and undermines the labor-management relationship. It is irrational because excepted service employees perform the same duties as preference eligible employees.

Excepted service employees are not in confidential or policy-making jobs, they are excepted from the formalized tests for entry into jobs. This fact provides absolutely no basis for eliminating the right to challenge an arbitrary discharge, and excepted service jobs are evaluated pursuant to OPM standards for hiring, yet they may be discharged on whim.

It is contrary to the CSRA because section 7511 of the act specifically authorized OPM to provide appeal rights to nonpreference eligible excepted service employees. The then chair of the Civil Service Commission testified that excepted service employees were "careerists within their agencies" and that, "Equity and fairness demanded that all employees with career expectations should be ac-

corded equal rights," yet OPM has not acted in 10 years and certainly OPM did not pledge to act today.

The courts finished the job on excepted service employees by concluding that since excepted service employees had no appeal right to the MSPB they had no separate and independent right to appeal to arbitration under section 7121 of the act.

H.R. 3098 is the remedy. It will bring rationality to personnel management through the fair and equitable treatment of all career employees. It will reaffirm and give meaning to merit principles and will restore the goals of Federal labor law. H.R. 3086 will correct the inadequacy of OPM's performance and fulfill the intent of the CSRA.

The bill wisely includes the right to appeal both chapter 43 and 75 actions. To provide for appeal of one type of actions but not another when the result is the same for either is simply to allow management to designate any action as nonappealable. The interrelationship between chapters 75 and 43 in obtaining the goals of the merit system dictate that the merit concept of employee appeal rights be applied to actions under either chapter.

The OPM argument that excepted service employees were not tested or ranked and therefore should not have appeal rights is totally inconsistent with OPM's argument that those who have a 3.0 grade point average should be automatically selected and automatically included as part of the competitive service, and, second, the argument that excepted service employees have appeal rights within the agency is absolutely ludicrous. To have one level of management review the decisions of another level of management is certainly not due process. A fundamental element of due process is fairness in the decision-making arena, and certainly with the agency appeal system that fairness would be absent.

Mr. Chairman, this is a bill which does not cost money. It corrects arbitrary distinctions and is in the public interest. We certainly believe that H.R. 3086 is long overdue.

Thank you very much.

[The statement of Mr. Tobias follows:]

STATEMENT OF
ROBERT M. TOBIAS
NATIONAL PRESIDENT
The National Treasury Employees Union

I am Robert M. Tobias, National President, of the National Treasury Employees Union (NTEU). NTEU is the exclusive bargaining agent for over 140,000 employees working in the various agencies of the federal government.

On behalf of the members and officers of NTEU, I would like to express appreciation for this opportunity to testify in support of H.R. 3086. This bill is a desperately needed correction to remedy a structural flaw in the federal merit and personnel systems.

The principle of personnel action based solely on the performance of the public service is the foundation of an effective and efficient federal service. Public management must take only those personnel actions that are consistent with the public interest as determined by employee job performance and job conduct. Actions taken on any other basis, or the perception that personnel actions are rooted in non-work related factors, does violence to both the internal and external credibility of the federal service.

The public will have little confidence in the actions of federal agencies, and employees will have no trust in management with a personnel system that is subject to the personal manipulation of public managers. The structure of the federal merit and personnel systems is designed to serve the dual purposes of protecting the public interest in federal employment and protecting

the right of employees to elemental fairness in their employment. Through these dual purposes, the federal service can achieve its singular goal of a productive and effective workforce that serves the public.

The right of employees to appeal personnel actions is a critical link in the federal personnel structure. It serves not only to protect employees, but is also an indispensable check on management that ensures the public service purpose of personnel actions. Employee appeal rights are not an impediment to legitimate management action, but rather are mechanisms, in the words of the U.S. Court of Appeals for the Federal Circuit, "requiring management to act for the right reasons."

Within the federal personnel structure is a gaping hole in which management is not required to act for the "right reasons" and where there is no effective check on the validity of management actions. In the netherworld of the excepted service, employees work subject to the whim and pleasure of their managers. No length of service and no level of performance in the excepted service can protect a non-preference eligible employee from the illegitimate or irrational actions of management. There is no meaningful remedy or recourse available to employees suffering the consequences of personnel actions rooted in politics, personality, nepotism, or just plain stupidity. Serving the public is subordinated to pleasing the boss. Absent the right of appeal, management is personnel law unto itself.

In the effort to revitalize the federal service and to restore

the public's confidence in it--a goal that both NTEU and this Sub-Committee share--we must act with dispatch to secure the underpinnings of the merit system and provide for sound personnel practice. H.R. 3086--in extending appeal rights to excepted service employees for performance-related and other adverse personnel actions--is a crucial component of that effort.

The current situation is irrational, inconsistent with the legislative intent of the Civil Service Reform Act (CSRA), and undermining the labor-management relationship.

In the performance of their duties, excepted service employees covered under the provisions of H.R. 3086 are indistinguishable from any other civil service employees. There is nothing inherent in their jobs or their persons that dictates the denial of appeal rights.

Those excepted service employees who currently have appeal rights, preference-eligible veterans, perform the same tasks and are in the same positions as other excepted service employees. The provision of appeal rights to certain categories of veterans in the excepted service is not tied to any job-related characteristic, nor has there been any demonstration that such appeal rights have adversely affected the functioning of the excepted service.

While opponents of extending appeal rights argue that the nature of excepted service jobs should preclude such rights, they can never explain why certain individual employees having appeal rights apparently does no damage to the service, but other employees having appeal rights somehow would do damage. The

arguments against extending appeal rights, like the system they wish to maintain, are devoid of logic or rationality.

Excepted service positions covered under H.R. 3086 are not policy-making or confidential jobs. They are not political appointments. They are, in fact, career civil service jobs to be performed on the basis of professionalism and competence.

Excepted service employees covered under H.R. 3086 are basically "excepted" only in the sense of being exempt from a formalized and standardized test for entry into the federal service. The excepted service is not, however, "excepted" or exempt from the requirements of merit system principles.

A large portion of excepted service jobs are "excepted" merely as a matter of management convenience. Positions under Schedules A and B of the excepted service, for instance, are so placed simply because of the impracticality or unavailability of formal written tests. The standards of performance and the expectation of professionalism and competence from the individuals filling those jobs are exactly the same as any other career civil service position. Individuals selected for Schedule A and B excepted service jobs are subject to scrutiny of their professional credentials and qualifications, and are supposed to be evaluated for hiring, according to OPM regulations, in a manner consistent with competitive selection.

Excepted service employees, like other civil service employees, must complete a probationary employment period. H.R. 3086 would not confer any appeal rights for removal of excepted

service employees during the probationary period, and would allow for the effective evaluation of an employee's actual job performance prior to the conferment of appeal rights. The denial of post-probation appeal rights, however, is to relegate excepted service employees to the career limbo of permanent probation.

In enacting the CSRA, Congress recognized the necessity of providing appeal rights to excepted service employees, and intended that those employees who would now be covered under H.R. 3086 should be extended such rights. Under Section 7511 of the CSRA, Congress specifically authorized OPM to provide appeal rights to non-preference eligible excepted service employees who were not in confidential or policy-making jobs.

In explaining the rationale for Section 7511, the then chairman of the Civil Service Commission testified that excepted service employees were "careerists within their agencies" and that "equity and fairness" demanded that "all employees with career expectations should be accorded equal rights." Civil Service Reform: Hearings before the House Committee on Post and Civil Service, 95th Cong. 2d Sess., 29-30 (1978). Furthermore, the Senate Report strongly signals that Congress expected that appeal rights would be extended to the excepted service unless a determination was "made that a position meets the confidential or policy-making criteria established by [section 7511]." S. Rep. 95-969, 95th Cong. 2d Sess. 48 (1978). Congress left to OPM only the task of sorting through excepted service positions to determine which were policy-making or confidential.

OPM has simply ignored, as it has so many other instances, its responsibility to provide for the merit system and sound personnel management. Moreover, the consequence of OPM's failure to extend statutory appeal rights has been to effectively strangle other rights of excepted service employees under federal labor law.

In an interpretation of the CSRA, that can only be described as destructive of the law's overall purpose, the U.S. Court of Appeals for the District of Columbia has held that the absence of statutory appeal rights for non-preference eligible excepted service employees precludes recourse for these employees in disciplinary cases to a labor-management negotiated grievance procedure. In a perverse twist, the Court has held that the failure to provide rights, despite Congressional intent, in one area is the basis for the destruction of statutory rights in another area of the law.

The grievance procedure provision of federal labor law does not exclude non-preference eligible excepted service employees from the definition of "employee" and does not exclude disciplinary cases involving these employees from the definition of "grievance." Further, a grievance procedure specified by the law is required in all federal labor-management contracts. Yet, the absence of statutory appeal rights for non-preference eligible excepted service employees and OPM's failure to adhere to Congressional intent for the extension of these rights has been utilized to effectively rewrite the labor law.

The impact goes far beyond the immediate issue of grievances.

While federal labor law ensures the right of employees--including non-preference eligible excepted service employees--"to participate through labor organizations of their own choosing in the decisions which affect them," how effective can such participation be when employees can be removed without cause or recourse?

In negotiating contracts, in resolving workplace problems, and in pursuing issues of employee concern, there will be disagreements, and sometimes heated discussions, between employee union representatives and managers. The purpose of the labor law is to give open and honest voice to employees on workplace matters. And through this equal exchange of views, we can achieve positive work relations. The employee voice, however, will be stifled and ultimately silenced if management has the unilateral and unchecked authority to remove that voice at its pleasure.

Access to a fair and impartial grievance procedure is an integral part of productive labor-management relations and is a standard feature of private labor agreements. NTEU has made great strides in forging labor-management cooperation. These cooperative relations have been made possible only through active employee involvement. The maturation of labor relations will be retarded, if not reversed, by the continued denial of appeal and grievance rights to a large portion of the approximately 450,000 non-postal excepted service employees.

H.R. 3086 is the remedy. It will bring rationality to personnel management through the fair and equitable treatment of all career employees. It will reaffirm and give meaning to merit

principles, and will restore the goals of federal labor law. H.R. 3086 will correct the inadequacies of OPM's performance and fulfill the intent of the CSRA.

To achieve these ends, H.R. 3086 has correctly included the right to appeal both Chapter 75 and Chapter 43 personnel actions. While there are technical distinctions between the two, the result of either is adverse to the employee involved. In actual practice, the two types of actions are not so neatly divided or clearly distinguished. Employee job-related conduct covered under Chapter 75, and employee job performance covered under Chapter 43 are often intertwined in management's decision to reduce or remove an employee.

Most importantly, to provide for appeal on one type of action but not another when the result is the same for either, is simply to allow management to designate any action as a non-appealable. If Chapter 43 actions are non-appealable, than any removal or reduction, regardless of the reason, will be deemed a Chapter 43 action at the pleasure of management. And if Chapter 43 actions aren't appealable, there is no check to ensure that the action was, in fact, a Chapter 43 action. We would face the same irrationality, opportunity for abuse, and inequity that we have now.

Further, the exclusion of Chapter 43 actions would introduce unnecessary technical complexity to a process that is to provide relatively simple and expeditious resolution. Determining the type of action could consume more time than taking and resolving the action. It would be confusing to employees as well as managers. And

at the same time, it would not inhibit the ill-motivated manager, or protect the innocent employee from arbitrary action.

The U.S. Court of Appeals for the Federal Circuit recognized the irrationality in attempting to make rigid distinctions between Chapter 75 and Chapter 43 actions. In Loyshin v. Department of Navy, the Court held that "Chapters 43 and 75 establish separate procedural mechanisms, both of which can be used to obtain the objectives Congress sought in enacting the CSRA" and "there is no necessary conflict in utilizing both chapters for such actions." The Court reasoned that to make a rigid distinction would be a "return to the technical complexities...that Congress characterized as 'asphyxiating' of merit principles." Loyshin v. Department of Navy, 767 F.2d 826 (1985).

The interrelationship between Chapters 75 an 43 in obtaining the goals of the merit system as noted by the Court also dictate that the merit concept of employee appeal rights be applied to actions under either Chapter. Other civil service employees have appeal rights for both types of actions. There is no basis to make a distinction for non-preference eligible excepted service employees. The purpose of appeal rights--a check on management to ensure that personnel actions are taken for the "right reasons"--is equally valid for actions taken under either Chapter.

H.R. 3086 is long overdue.

NTEU would be happy to provide any additional information or assistance that might be of use to the Sub-Committee.

Mr. SIKORSKI. Thank you.

We will put Mr. Sturdivant's statement in the record. Did you want to summarize?

STATEMENT OF SANDRA S. ADAMS-CHOATE

Ms. ADAMS-CHOATE. My name is Sandra Choate. I am the legislative attorney for the American Federation of Government Employees. AFGE represents over 700,000 employees, both in the excepted service and not in the excepted service.

[The statement of Mr. Sturdivant, which was presented by Ms. Choate, follows:]

JOHN N. STURDIVANT
NATIONAL PRESIDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
(AFL-CIO)

Mr. Chairman, members of the Committee, my name is John N. Sturdivant. I am President of the American Federation of Government Employees, AFL-CIO (AFGE), which represents over 700,000 active and retired government workers across the country, including many who are in the excepted service.

For the first time in the history of the United States civil service, the Civil Service Reform Act of 1978 set into law clearly articulated merit system principles. To insure that those principles were utilized in framing personnel policies, the Act directed that all decisions concerning personnel matters be made in such a manner as will ensure that personnel management is based on and embodies the statutorily defined principles.

More specifically, the Act provides that "all employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management..." (5 U.S.C. §2301). But, despite the clear intent of the Civil Service Reform Act, not all employees are being treated fairly.

The Act provided employees with procedural appeal rights when adverse actions are taken by the employing agency. However, such appeal rights are granted only to those employees in the competitive service and to preference eligible veterans in the excepted service who have been employed for more than one year and who are affected by a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay or a furlough of 30 days or less. (5 U.S.C. §7512). Excepted service employees are not

accorded these protections. The statutory protections include 30 days' advance written notice of the proposed action, a reasonable time (at least 7 days) to answer the notice, to be represented, a written decision, and the right to appeal to the Merit Systems Protection Board and to the United States Court of Appeals for the Federal Circuit. (5 U.S.C. §7513).

There are over 500,000 employees hired under the excepted service including attorneys, scientists, physicians, chaplains, handicapped workers and certain other mid-level appointees. Many of these employees are truly career or permanent employees of the Federal Government. They are not political appointees or policy-makers who serve at the pleasure of the current administration. Yet, because they are appointed to their positions in a manner other than by a traditional, competitive entry appointment, they are denied the averse action protections granted every other career employee. They may be fired without cause. In short, they serve the Government at the whim and subjectivity of their supervisors. This certainly is contrary to the very essence of the merit principle mandating that "all employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management."

In addition to the statutory adverse action protections, the Civil Service Reform Act also provided employees in bargaining units with the right to elect to utilize the grievance/arbitration review process under the labor provisions of Chapter 71 of Title

5. Up until just recently, it was generally believed that review of adverse actions via the grievance/arbitration procedures under Chapter 71 was applicable to all employees including the excepted service employees who were in bargaining units. Labor organizations and agencies, as a matter of course, negotiated contracts which provided for the use of the negotiated grievance procedure by excepted service employees. Excepted service employees in AFGE bargaining units were, as a matter of course, allowed to utilize these negotiated grievance procedures.

However, in May, 1989, the United States Court of Appeals for the District of Columbia Circuit held that excepted service employees have no right to arbitral review, thereby effectively nullifying the many labor agreements which provided for such review. This decision, which we believe was misguided and erroneous, further highlights the inequitable disparity between competitive and career excepted service employees. But more importantly, it has had a decided negative impact on morale which as we all know, is at an all-time low. Our members at the Department of Education have just informed us that DoE has circulated a memo indicating that arbitral review will no longer be available to excepted service employees. We feel certain this action is in direct response to the D.C. Court of Appeals decision because utilization of the negotiated grievance procedure not only was a contractual right but a process which had worked well for both labor and management. It is inevitable that other agencies

will take similar actions. Hence, it is imperative that this situation be remedied immediately

Only legislation will correct this inequity and, hence, we wholeheartedly endorse H.R. 3086 which will do just that.

Those employees who are serving in positions under Schedules A and B are truly career employees. They are not political appointees serving in policy-making positions. Thus, there is no reason why the adverse action and grievance/arbitration rights extended to competitive employees should not also be extended to such excepted service employees. This would be consistent with the intent of the Civil Service Reform Act to ensure uniformity in personnel decisions and promote efficiency of administration.

It is our contention that competitive service status is an erroneous basis to use in determining whether or not an employee should be entitled to adverse action protections. The basis should be whether or not an employee is a career employee. If the statutory adverse action protections and when applicable, the Chapter 71 (grievance/arbitration) rights were extended to all career employees; then, essentially, the only employees who would be excluded would be the Schedule C employees. Those employees occupy positions of a confidential or policy-making character. For the most part, they are political appointees, brought in by or with the consent of the President at the time he is elected. They are not career employees in the traditional sense and, hence, need

not and should not be accorded the same rights, privileges and protections as are career employees.

H.R. 3086 is an improvement over similar legislation introduced in prior Congresses. Not only would it extend the adverse action protections to certain excepted service employees but it would do so on the same basis as is provided for competitive service employees. Specifically, it requires only one year of service rather than two as contemplated in earlier drafts of this legislation. In addition, in providing for alternative locations for MSPB hearings, H.R. 3086 makes clear that the provision is applicable not only to employees but to former employees and applicants for employment.

Because of the inter-relation between Sections 7701 and 7121(e) of the Reform Act, it is clear to us that passage of this Bill would also extend to these employees the labor protections afforded employees under Chapter 71 of Title 5. To the extent that there is any doubt in the Committee's mind concerning the inter-relationship of the adverse action and the labor protections, the issue could be specifically addressed by providing that all employees granted Chapter 75 (adverse action) rights also have Chapter 71 (grievance/arbitration) rights. This could be accomplished by utilization of the following language:

GRIEVANCE PROCEDURES.

> The provisions of Section 7121 of Title 5 shall be applicable to all employees as defined in Section 7511 of Title 5 and who also meet the definition of an employee set forth in Section 7103 of Title 5.

Mr. Chairman, we commend you on your efforts to resolve this problem and we appreciate the opportunity to appear here today to express our views on this issue.

Mr. SIKORSKI. The gentlewoman from Maryland.

Mrs. MORELLA. Thank you.

I have read the statement and will review it again. I really appreciate your being here. We will tell Mr. Sturdivant that his surrogate was exemplary.

Ms. ADAMS-CHOATE. Thank you.

Mrs. MORELLA. It is nice to hear from all of you.

Mr. Peirce, you seemed to question that I had mentioned to Mr. Rollins something about that long history of abuse, but it was because in his statement he said, "We have had a long history of abuse," and I was curious about this system of abuse and why it came about. I would agree, if even one person is harmed by virtue of not having due process, then the system should be changed. I wanted to clarify that.

Also, I noticed that, listening to your statement, you mentioned that there are some people who are—I think you said, "In many cases, those people who are in the excepted service positions do not realize that they are not entitled to the same protections as the tenured competitive employees until they face adverse employment action." Is that true? Why are they not informed of this?

Mr. PEIRCE. Absolutely. We have employees in BIA, IHS, at lower levels in the support staff area. If you go out and you start talking to Federal employees, they really don't know the difference between an excepted appointment, a career appointment, and so forth, because, number one, in the indoctrination or orientation, this has never been explained to them. So how would they know the difference, unless somebody tells them there is a difference?

Mrs. MORELLA. No. We assume that somebody tells them or at some point they see this and they know what rules they are operating under.

Mr. PEIRCE. I am afraid it is like a lot of other things. We are just not getting, with new employees or even employees that have been on board, the counseling, the consultation.

I will take a new item, or a relatively new item, FERS, the new retirement system. Folks still don't understand that system. What happened was, it was a responsibility of the people in personnel to explain this, and we found that many of the personnel people couldn't explain it.

Mrs. MORELLA. That may be the case. I know that there was a great deal of work that went into outreach to have information and explanation programs, and many of us in Congress had forums in our districts on it, too, to try to orient people. I mean there was an attempt made with the FERS program, and it is still continuing.

But it seems to me that there should also be an attempt made for this. I think it is inexcusable that it is not part of the orientation that they are told about their rights and responsibilities.

Further on, you talk about some of the categories of people who are not included within this legislation, and I just wondered, do they know that they also do not have the due process rights? Are they aware of that?

Mr. PEIRCE. Well, I guess I can mention one. The National Guard technicians are excepted service, and, believe me, they know they are not included.

Mr. SIKORSKI. We are not going to help them.

Mr. PEIRCE. I realize that.

Mrs. MORELLA. No, they are not in it. You mentioned that in your testimony.

Mr. PEIRCE. Unfortunately.

Mrs. MORELLA. I don't know about the others. I just wondered if they are not aware that they do not have the protections of the Merit Systems Protection Board.

Mr. PEIRCE. The big difference is, with the National Guard technicians, any attempt we made to negotiate the grievance procedure going beyond the Adjutant General level met with very, very strong resistance, while in just about all the other areas where we have excepted service employees we are able to negotiate a contract where they did have access to the grievance procedure and subsequently arbitration. Now the court decisions have taken that away.

Mr. TOBIAS. You see, the issue has never come to a head until recently because even though most of these excepted service employees could not appeal to the MSPB, it wasn't relative to them because they were covered by collective bargaining agreements which allowed them to appeal their cases to an outside arbitrator. They would never appeal to the MSPB anyway, so they would always go to arbitration, so it wasn't an issue, but now it is an issue because the courts have said, "You can't appeal under the arbitration procedure," so they are left with nothing, and, believe me, they know.

Mrs. MORELLA. Mr. Tobias, it was very good that you gave us kind of the history and the intent of Congress in this particular issue. You stated in your testimony that Congress left to OPM the task of sorting through excepted service positions in order to determine which ones were policy-making or confidential. Was this done?

Mr. TOBIAS. No; 7511(b)(2)(a) of the act gives OPM the authority to determine who is going to be excepted from the competitive service, and there was much discussion at the time the act was passed about these excepted service employees and whether or not they should have appeal rights to the MSPB, and the administration argued at the time, "Well, these people are confidential, they are policy-making, and therefore they all ought to be excluded." We argued, "Nonsense," and the compromise that was reached was that OPM would look at these jobs, decide which were confidential, and allow the rest to have appeal rights to MSPB. That hasn't occurred. There has been no change since 1979.

Mrs. MORELLA. That may be a question that I will direct to Ms. Newman, and she can respond to the committee in some way.

Also, in terms of the case of U.S. versus Fausto, which seemed like a kind of reversal, it seemed to say that the congressional intent was to cut off the review procedure for excepted service employees.

Mr. TOBIAS. We have been burdened with the Fausto decision. I don't think that Fausto holds as subsequent circuit courts have ruled, but, of course, when you lose you always say that. The fact of the matter is that these excepted service employees are not covered, and this legislation would fix it, and that is really the issue.

Mrs. MORELLA. I would agree with you. I thank you very much.

Mr. Sturdivant, we are delighted that you are here, and I want you to know that you were very well represented.

Mr. STURDIVANT. Thank you.

Mrs. MORELLA. Thank you, Mr. Chairman.

Mr. SIKORSKI. Thank you.

On that *Fausto* decision, if you want a wonderful, wonderfully boring, reading of how the courts utilize certain what are called canons of construction for interpreting congressional or legislative intent, you can begin reading that and bring along a chart. Bring along pens for diagramming and lines and all that, because when you are done you will be thoroughly confused and you will see that the same canon of construction is used by the dissenters and the majority to end up at totally different conclusions.

We do know this, that court decisions have eliminated arbitrated, collectively bargained agreements to provide due process rights. The Supreme Court has eliminated the judicial avenue as a way to provide due process rights and appeal process to the courts, so the nonpreference excepted service employee in the Federal Government who is usually career, midlevel or above, and works admirably and dedicatedly for years ends up with no way to appeal. They can't go to the courts, can't bargain to an arbitrator, and, under the interpretation of the Civil Service Reform Act, can't be treated like the people next to him or down the hall from her. So that is why we are here and, at a time that is more important than ever before, to kind of eliminate this one injustice.

Mr. TOBIAS. Mr. Sikorski, I might also mention that this idea of appealing inside the agency really rankles me.

Mr. SIKORSKI. I couldn't agree with you more. I know you skipped over that testimony in the interests of time, but your testimony was right on on that.

Mr. TOBIAS. Thank you.

We have had a history of dealing with internal agency appeals prior to the Civil Service Reform Act, and the history is abysmal.

Mr. SIKORSKI. That is not due process; that simply isn't procedure or due process at all.

Thank you all for being here.

[The subcommittee is adjourned.]

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

[The following letter was received for the record.]

International Organization of

Masters, Mates & Pilots

The Honorable Gerry Sikorski, Chairman
Subcommittee on Civil Service
House Committee on Post Office and Civil Service
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sikorski:

As President of the International Organization of Masters, Mates & Pilots (IOMM&P), I appreciate this opportunity to comment on H.R. 3086, the Excepted Service Appeals Rights Act of 1989. This bill amends Title 5, USC, to grant appeal rights to members of the excepted service affected by adverse personnel actions, and for other purposes.

This bill will enable members of our union who are employed by the Military Sealift Command (MSC) as licensed deck officers (LDO's) to retain the rights negotiated for them in our contract with MSC. Last year's Supreme Court decision (United States v. Fausto) cut off an alternative method of judicial review for excepted service employees, saying that Congress, in passing the Civil Service Reform Act of 1978, had intended to deprive excepted service employees, other than those of veterans preference, of the right to challenge adverse actions. This bill reinstates the rights of our LDO's employed by the MSC to appeal adverse personnel actions taken by the MSC.

As you know, excepted service employees are employees excepted from the competitive service because there is no practical way to test for these positions or because certain occupations already require certification of minimum proficiency as a prerequisite to licensing. Our LDO's are highly skilled professionals who serve as civilian mariners on MSC vessels essential to the support of our military. Shoreside employees of the MSC, whose jobs rely in large part on the mariners crewing these vessels, are virtually all competitive service employees with full protections for adverse actions. This creates a discriminatory situation between offshore and shoreside employees of the same employer.

The merchant mariners often sail their vessels in hazardous situations and never hesitate to place themselves in harm's way. It seems particularly unfair that these dedicated individuals should be penalized by depriving them of appeal rights granted to other civil servants.

I would also like to take this opportunity to thank you and your staff for acting so quickly to introduce H.R. 3086 to correct this problem and for scheduling a prompt hearing.

I look forward to working with you and your staff to ensure prompt passage of this important legislation. Please do not hesitate to call on me if I may be of any assistance.

Sincerely,

Robert J. Lowen
International President

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